IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 245 (see No. 239)
247

IRWIN STEINGUT and HAROLD E. BLODGETT, as Receivers of the Assets in New York of Russo-Asiatic Bank,

Petitioners,

against

GUARANTY TRUST COMPANY OF NEW YORK, JAMES A. TILLMAN, JESSE C. MILLARD and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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August 1, 1947.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Irwin Steingut and Harold E. Blodgett, as Receivers of the assets in New York of Russo-Asiatic Bank (hereinafter sometimes called the Receivers), respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court, entered May 7, 1947, affirming a judgment of the United States District Court for the Southern District of New York, entered March 21, 1945, dismissing petitioners' complaint herein. A cer-

tified transcript of the record in this case, including proceedings in said Circuit Court of Appeals, has been furnished in accordance with Rule 38, par. 1 of the Rules of this Court.

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court is reported in 58 F. Supp. 623 (1944). The opinion of the Second Circuit Court of Appeals, handed down on May 7, 1947 (R. 3562), is reported in 161 F. 2d 571 (1947).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 STAT. 938 (1925), 28 U. S. C. § 347(a) (1940)). The date of the judgment of the Circuit Court of Appeals for the Second Circuit to be reviewed is May 7, 1947.

STATEMENT

This case involves primarily the effect of the Litvinov Assignment (Ex. 26, R. 3320-21) upon the rights of American and other non-Russian creditors of Russo-Asiatic Bank, a former Russian banking corporation (hereinafter called Russo-Asiatic), to enforce their claims against assets of Russo-Asiatic in the State of New York, through the medium of a receivership provided for by the laws of that State (New York Civil Practice Act, Section 977-b). It presents questions of importance which were left open for future determination by this Court in *United States* v. *Belmont*, 301 U. S. 324 (1937) and *United States* v. *Pink*, 315 U. S. 203 (1942).

Russo-Asiatic was a joint stock banking corporation organized under the laws of the Russian Empire in 1910. In addition to offices in European and Asiatic Russia, Russo-Asiatic maintained offices in France, Great Britain, China and Japan (R. 223).

In 1917, Russo-Asiatic maintained dollar deposit accounts with various banks in New York, including the respondent Guaranty Trust Company of New York (hereinafter called Guaranty). On December 27, 1917, the net credit balances in the dollar accounts of Russo-Asiatic at Petrograd, Moscow, Yousovka and Vladivostok* with Guaranty in New York aggregated $1,483,481.36. No part of such credit balances and no interest thereon since December 26, 1917, has been paid (R. 230-3).

Russo-Asiatic was "nationalized" in Russia pursuant to a series of decrees of the Soviet Government beginning December 27, 1917** (Exs. 2A, R. 2681; 2B, R. 3151; 2C, R. 3152; 2D, R. 2683; 2G, R. 2685; 2H, R. 2687; 2J, R. 3155; 2K, R. 2689; 2L, R. 3168). Unique among the Soviet nationalization decrees, the basic decree nationalizing banks provided for the assumption of liabilities as well as of assets.

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*Russo-Asiatic also maintained dollar accounts with Guaranty for its branches at Shanghai, Paris and Yokohama, the net credit balances in which aggregated, on December 27, 1917, $870,742.25. Between that date and April 19, 1927, however, such credit balances were withdrawn in the regular course of business by the respective branches of Russo-Asiatic continuing to do business outside of Soviet Russia (R. 233).

**Except where otherwise indicated, all dates mentioned herein are according to the American calendar rather than the Russian calendar, which, prior to February 1, 1918, was 13 days behind the American calendar.

The non-Russian branches of Russo-Asiatic, including branches in France, England, China and Japan, continued to do business until their respective liquidations in those countries in 1926 (R. 227).

This action was instituted on May 12, 1919, in the name and on behalf of Russo-Asiatic, to recover the funds of Russo-Asiatic on deposit with Guaranty. In 1938, the petitioners were, by a judgment of the Supreme Court of the State of New York, appointed permanent Receivers of the assets in New York of Russo-Asiatic, pursuant to Section 977-b of the New York Civil Practice Act (R. 564), and by order of the United States District Court for the Southern District of New York, dated July 29, 1939, were substituted as plaintiffs in the action (R. 229-30).

Among the claims of creditors of Russo-Asiatic filed with the Receivers, pursuant to the New York Statute, are claims of American nationals, Friede, Tillman and Manufacturers Trust Company and a claim by Millard as assignee of the Chinese Government (R. 249-50). The Friede claim is based upon a pre-nationalization contract for payment of dollars in New York out of Russo-Asiatic funds on deposit there (R. 560-1). The Millard claim is for moneys paid by the Chinese Government to Russo-Asiatic at Shanghai during the period from 1917 to 1926, for transmission to its London branch pursuant to the Chinese Reorganization Loan Agreement of 1913 (R. 557-60).

Prior to the Litvinov Assignment, attachment liens upon the funds in suit were acquired by Tillman on August 24, 1927, Millard on March 28, 1933, and Friede on September 25, 1933 (R. 249).

The United States Government, as assignee of the Government of Soviet Russia under the Litvinov Assignment,

instituted two actions, one in 1934 and one in 1937, to recover the same funds sought by the Receivers. Those two actions were consolidated with the Receivers' action for the purposes of trial and the three actions were tried together. The District Court held that the United States was entitled to the funds (R. 253-4) and the Second Circuit Court of Appeals affirmed on the opinion of the District Court (R. 3562).

The court below decided that the funds on deposit to the credit of Russo-Asiatic with Guaranty became the property of the Soviet Government in 1917 by virtue of the decree nationalizing Russian banks (R. 226); that upon diplomatic recognition by our Government of the Soviet Government in 1933, the Soviet decree was entitled to enforcement here "retrospectively to 1917" (R. 3075); that, therefore, when the Receivers were appointed, the funds on deposit with Guaranty had been the property of the Soviet Government since 1917 and were not the property of Russo-Asiatic (R. 3075-7); and that those funds became the property of the United States Government in 1933 by reason of the Litvinov Assignment (R. 3076).

QUESTIONS PRESENTED AND REASONS FOR GRANTING WRIT

1. The first question presented is whether the Litvinov Assignment deprived American nationals and other non-Russians of their rights under local law in respect of New York assets of a nationalized Russian corporation. In holding that it did, the court below has decided an important question of federal law which has not been, but should be, settled by this Court. *United States* v. *Belmont*, 301 U. S. 324, 332 (1937); *United States* v. *Pink*, 315 U. S. 203, 227 (1942).

2. The second question presented is whether rights acquired by attachment prior to the Litvinov Assignment by American and other non-Russian creditors of a nationalized Russian corporation, are superior to the rights of the United States under the Litvinov Assignment, either as "pre-existing infirmities" (*Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 142 (1938)), or by express exclusion from the Assignment. In holding that they are not, the court below has decided an important question of federal law which has not been, but should be, settled by this Court.

3. The third question presented is whether receivers under Section 977-b of the New York Civil Practice Act are entitled to assert the rights of creditors whose claims have been filed in the receivership. In holding that they are not, the court below has decided an important question of local law in a way probably in conflict with applicable local decisions.

4. The fourth question presented is whether the Soviet decrees confiscating properties of Russian banks—as distinguished from those affecting insurance and other corporations—had extraterritorial effect upon bank deposits in New York of such banks. In holding that they did, and that by reason thereof the United States acquired title to such deposits under the Litvinov Assignment, the court below decided an important federal question (*United States* v. *Pink,* 315 U. S. 203, 217), which has not been, but should be, settled by this Court.

5. The fifth question presented is whether the Litvinov Assignment requires the nullification of the procedural and remedial provisions of a state law, Section 977-b of the New York Civil Practice Act, which, among other things,

regulates the procedure for the enforcement of the rights of all persons in respect of New York assets of dissolved foreign corporations. In holding that it does, the court below decided a federal question in a way probably in conflict with applicable decisions of this Court. *Clark* v. *Williard*, 294 U. S. 211 (1935); *United States* v. *Bank of New York and Trust Co.*, 296 U. S. 463 (1936); *Guaranty Trust Co.* v. *United States*, 304 U. S. 126 (1938).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, sitting at New York, N. Y., commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals in this case to the end that this case may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that your petitioners be granted such other and further relief as may seem proper.

IRWIN STEINGUT and HAROLD E. BLODGETT,
as Receivers of the Assets in New York of Russo-Asiatic Bank
by ALBERT R. CONNELLY
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Of Counsel.

August 1, 1947.

BRIEF IN SUPPORT OF PETITION

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the Litvinov Assignment deprived American nationals and other non-Russians of their rights under local law in respect of the New York assets of Russo-Asiatic.

2. In refusing to hold that rights to the funds in suit which were acquired by attachment prior to the Litvinov Assignment by American and other non-Russian creditors of Russo-Asiatic, are superior to the rights of the United States under the Litvinov Assignment, either as "preexisting infirmities", or by express exclusion from the Assignment.

3. In holding that the petitioners, as receivers of the assets in New York of Russo-Asiatic under Section 977-b of the New York Civil Practice Act, are not entitled to assert in this action the rights of creditors of Russo-Asiatic whose claims have been filed in the receivership.

4. In holding that the Soviet decrees nationalizing banks operated to vest title to Russo-Asiatic's deposits with Guaranty in New York in the Soviet Government and, by assignment, in the United States.

5. In holding that the Litvinov Assignment requires the nullification of the procedural and remedial provisions of Section 977-b of the New York Civil Practice Act.

6. In affirming the judgment of the District Court dismissing the petitioners' complaint.

ARGUMENT

Introductory

The decision of the court below denying recovery to the Receivers and holding that the United States acquired paramount title to the funds in suit under the Litvinov Assignment, was predicated wholly upon the interpretation of national policy announced by this Court in *United States* v. *Pink*, 315 U. S. 203 (1942).* Every other question in this case, including the attack made by Guaranty upon the status of the petitioners as receivers under Section 977-b of the New York Civil Practice Act and the validity of the legislation under which they were appointed, was determined in favor of the petitioners.

In the *Pink* case, the United States, as assignee of the Soviet Government under the Litvinov Assignment, was held to be entitled to recover the assets of the New York branch of First Russian Insurance Company which remained in the hands of the New York Superintendent of Insurance after all domestic creditors had been paid.

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*The rationale of the decision in the *Pink* case, as expressed in the majority opinion, was that the enforcement of the policy of the State of New York, denying extraterritorial effect to the confiscatory decrees of the Soviet Government "would collide with and subtract from the Federal policy", and would tend "to restore some of the precise irritants which have long affected the relations between these two great nations and which the policy of recognition was designed to eliminate" (315 U. S. at pp. 231, 232). It has been recognized that the "final settlement of claims and counterclaims" between the two governments and their nationals, to which the Litvinov Assignment was expressly stated to be "preparatory" (315 U. S. at p. 212) has become impossible of achievement. See Note, 29 Am. J. Int'l L. 290, 292; 2 Dep't. State Bull. 153, 154 (1940); and that it has otherwise failed of its purpose. See Bullitt, *The Great Globe Itself* (1946), 66-9.

Prior to that decision, the law of New York was clear, both before and after recognition of Soviet Russia, that New York would not give any effect to the nationalization decrees of the Soviet Government in so far as they purported to affect property located in New York. *Moscow Fire Ins. Co.* v. *Bank of New York,* 280 N. Y. 286 (1939), aff'd. without opinion, 309 U. S. 624 (1939), rehearing denied, 309 U. S. 697 (1939); *Petrogradsky M. K. Bank* v. *National City Bank,* 253 N. Y. 23 (1930); *James & Co.* v. *Second Russian Ins. Co.,* 239 N. Y. 248 (1925); *Vladikavkazky Ry. Co.* v. *New York Trust Co.,* 263 N. Y. 369 (1934). The Federal courts had held to the same effect. *Lehigh Valley R. Co.* v. *State of Russia,* 21 F. (2d) 396, 401 (C. C. A. 2d, 1927), cert. den. 275 U. S. 571 (1927); *United States* v. *Bank of New York & Trust Co.,* 10 F. Supp. 269 (S. D. N. Y., 1934), aff'd. 77 F. (2d) 866 (C. C. A. 2d, 1935), aff'd. 296 U. S. 463 (1936).

In fact, effect had been refused to the Soviet nationalization laws as to extraterritorial property not only in New York, but universally, both before and after recognition of Soviet Russia. See Nebolsine, "The Recovery of the Foreign Assets of Nationalized Russian Corporations", 39 Yale Law Journal 1130 (1930). Such treatment of the confiscatory decrees of Soviet Russia accorded with long-established principles applicable to confiscatory decrees of other nations. *Anderson* v. *N. V. Transadine Handelmaatschappij,* 289 N. Y. 9, 15 (1942); *Bollack* v. *Societe Generale,* 263 App. Div. 601, 603 (1st Dep't, 1942), leave to appeal to Court of Appeals denied, 264 App. Div. 767 (1st Dep't, 1942); *Banque Mellie Iran* v. *Yokohama Specie Bank,* 188 Misc. 346 (Sup. Ct. 1946).

The departure of the decision in the *Pink* case from established principles has been widely commented on:

> "The court has upset and parted with international law as heretofore understood, gravely impaired or weakened the protection to private property afforded by the Fifth Amendment of the United States Constitution, endowed a mere executive agreement by exchange of notes with the constitutional force of a formal treaty, misconstrued the agreement, and, it is respectfully submitted, confused that foreign policy of the United States in whose alleged support this revolutionary decision was thought necessary" [Borchard, *Extraterritorial Confiscations* 36 AM. J. INT'L L. 275 (1942)]

See also Jessup, "The Litvinov Assignment and the Pink Case", 36 *American Journal of International Law* 282 (1942); "Effect of Soviet Recognition upon Russian Confiscatory Decrees", 51 *Yale Law Journal* 848, 854 (1942) and "The Pink Case, the Recognition of Russia and the Litvinov Assignment", 30 *Georgetown Law Journal* 663, 673 (1942).

Whatever the merits of the decision in the *Pink* case, that decision left open major questions which are here presented for the first time, and which have acquired additional importance by reason of foreign legislation and events during World War II. See 16 Dept. State Bull. 1218 (1947) on Nationalization of industry in Rumania.

POINT I

THE CLAIMS OF AMERICAN NATIONALS AND OTHER NON-RUSSIAN CREDITORS OF RUSSO-ASIATIC ARE ENTITLED TO PROTECTION AGAINST THE EFFECT OF EXTRATERRITORIAL ENFORCEMENT OF THE SOVIET NATIONALIZATION DECREES.

One of the concurrent bases on which the decision by this court in the *Pink* case rested was the conclusion that

the claims of creditors there involved were not entitled to protection against the effect of extraterritorial enforcement of the nationalization decrees.

Among the claims filed with the Receivers here are claims of American nationals, i.e., Friede, Tillman and Manufacturers Trust Company, and the claim of Millard as assignee of the Chinese Government.

In *United States* v. *Belmont*, 301 U. S. 324 (1937), this Court pointed out that "So far as the record shows, only the rights of the Russian Corporation have been affected by what has been done", and that nationals of another country which has taken over their property must look to their own government for redress (p. 332). It was careful to state that "We do not consider the status of adverse claims, if there be any, of others not parties to this action. And nothing we have said is to be construed as foreclosing the assertion of any such claim to the fund involved, by intervention or other appropriate proceeding" (p. 333).

In the *Pink* case, this Court said (p. 226):

> "The holding in the *Belmont* case is therefore determinative of the present controversy, unless the stake of the foreign creditors in this liquidation proceeding and the provision which New York has provided for their protection call for a different result."

Mr. Justice Frankfurter in his concurring opinion likewise adverted to the special situation that was presented "when all claims of local creditors were satisfied and only the conflicting claims of Russia and of former Russian creditors were involved" (p. 236). The Court determined that such claims did not "call for a different result" from that reached in the *Belmont* case. See "Effect of Soviet Recognition

upon Russian Confiscatory Decrees", 51 *Yale Law Journal,* 848, 854 (1942):

> "* * * The *Pink* case should be limited to its facts, and should foreclose only Russian owners and Russian creditors from recovering assets within the United States to which the United States itself lays claim as assignee of the confiscating Russian Government."

This Court has thus far consistently reserved the question of claims of American nationals. Thus in *United States* v. *Belmont,* the Court said (301 U. S. at p. 332) that it would be time enough to consider the rights of our nationals when it shall be made to appear that they are so affected as to entitle them to judicial relief. Similarly in the *Pink* case, the Court was careful to state its assumption that none of the creditors whose claims were there asserted were citizens of the United States (p. 227). The concurring opinion of Mr. Justice Frankfurter emphasizes the same point (p. 237).

One of the main purposes of the Litvinov Assignment being the protection of American claims (*United States* v. *Pink,* 315 U. S. at p. 228) it would be strange indeed were the Assignment so to be construed as to deprive American nationals, pursuing their remedies in the courts, of their right to enforce the very claims sought to be protected. The emphasis given to the absence of American claims in the *Pink* case clearly implies a *caveat* that the rights of American nationals to enforce their claims were to be left intact.

The Government has expressed the same view of the scope of public policy applicable to the Litvinov Assignment. In its brief in this Court in *United States* v. *Moscow*

Fire Ins. Co., 309 U. S. 624 (1939), the Government said (at p. 89):

> "Even if the state policy formulated by the court below could operate in the absence of an expression of a dominant national policy, the Litvinov Assignment determines that policy to be that *after the payment of American nationals* the surplus fund shall be collected and liquidated in favor of the claims of the United States and of our nationals against the Soviet Government and its nationals." [Italics added.]

The Assignment has been similarly construed by the New York Court of Appeals. In *United States* v. *Manhattan Company*, 276 N. Y. 396 (1938), a case involving the rights of the United States in property of the Northern Insurance Company of Moscow, the Court of Appeals followed the *Belmont* case, and construed the decision as holding

> "* * * that recognition must be given to the validity of the confiscation decree * * * in so far only as the act of confiscation did not interfere with the rights and equities of our nationals in such property and of adverse claimants thereto to the extent that our courts may be opened to them for the assertion of their claims" (pp. 405, 406).

Any policy which would deny protection to the claims of American creditors would not only nullify the *raison d'etre* of the Litvinov Assignment, but would be violative of the Constitutional mandate that property may not be taken without compensation.

The right of enforcing a legal claim is property. *Pritchard* v. *Norton*, 106 U. S. 124, 132 (1882); *Sliosberg* v. *New York Life Ins. Co.*, 217 App. Div. 67 (1st Dep't

1926), aff'd 244 N. Y. 482 (1927). In the latter case the court said (217 App. Div. at p. 74):

> "When an action is instituted in the State Court the right of action becomes property within the State, and is then subject to the constitutional protection against its deprivation by any State law."

No treaty, far less an executive agreement, can violate the Constitution by taking such property from an American citizen without compensation. See *The Cherokee Tobacco,* 78 U. S. 616, 620, 621 (1870); *In re Beale,* 2 F. Supp. 899 (D. C. Minn., 1933), aff'd 71 F. (2d) 737 (C. C. A. 8th, 1934); *Geofroy* v. *Riggs,* 133 U. S. 258, 267 (1890).

The Executive having no authority in peace or war to confiscate property (*Brown* v. *United States,* 8 Cranch, 110, 128 [1814]), it would certainly follow that the Executive has no power to override the Constitution by indirection.

The claim of Millard, as assignee of the Chinese Government, is similarly entitled to protection. That claim is for moneys paid by the Chinese Government to Russo-Asiatic at Shanghai during the period from 1917 to 1926, for transmission to its London branch pursuant to the Chinese Reorganization Loan Agreement of 1913. The Millard claim, in the amount of £641,794.13.3, is based upon the difference between the amounts transmitted by the Shanghai branch of Russo-Asiatic to its London branch from 1917 to 1926 and the amounts disbursed by the London branch in payment of interest coupons and bond retirements in accordance with the Agreement (R. 557-60). It will be noted that the claim does not arise out of a Russian transaction made in contemplation of Russian law, but arises out of the perform-

ance by China of its obligations under the Reorganization Loan Agreement with branches of Russo-Asiatic *after* the decrees nationalizing banks in Russia (and partly after the Soviet-Chinese treaty of May 31, 1924 [Ex. 11; R. 3218]) and consequently it may not be said to be governed by Russian law.

It is submitted that the existence in this case of claims of American nationals and of other non-Russian creditors does "call for a different result" from that reached in the *Belmont* and *Pink* cases, and requires a determination that the Receivers, appointed to marshall the assets of Russo-Asiatic and to pass upon such claims by the court in which they are pending, are entitled to possession of the funds in suit.

POINT II

RIGHTS ACQUIRED BY ATTACHMENT PRIOR TO THE LITVINOV ASSIGNMENT BY AMERICAN AND OTHER NON-RUSSIAN CREDITORS OF RUSSO-ASIATIC, ARE SUPERIOR TO THE RIGHTS OF THE UNITED STATES UNDER THE LITVINOV ASSIGNMENT.

Although the Court in the *Pink* case characterized its holding in the *Belmont* case as a holding that recognition of a foreign sovereign 'is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence" (p. 223), that statement is manifestly subject to qualification in respect of intervening events. In the interregnum between the establishment of a foreign government in power and its recognition by this country, courts "are bound to consider the ancient state of things as remaining unaltered", *Kennett* v. *Chambers,* 14 How. 38, 51 (1852); *Rose* v. *Himely,* 4 Cranch 241 (1808);

Gelston v. *Hoyt,* 3 Wheat. 246 (1818); and what has been done in our courts is done with final effect. *Agency of Canadian Car Co.* v. *American Can Co.,* 258 Fed. 363, 369 (C. C. A. 2d, 1919); *Lehigh Valley RR.* v. *State of Russia,* 21 F. (2d) 396, 400, 401 (C. C. A. 2d, 1927); *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 141 (1938); *State of Russia* v. *National City Bank,* 69 F. (2d) 44, 48 (C. C. A. 2d, 1934).

In the *Pink* case, all domestic and some foreign creditors had been paid but there was no suggestion that such payments might be recovered by the United States. Similarly, in *Guaranty Trust Co.* v. *United States,* this Court pointed out that recognition of the Soviet Government, although "an action which for many purposes validated here that government's previous acts within its own territory", nevertheless "left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition"; and that the question remained whether any given right asserted by the United States under the Litvinov Assignment had been acquired "free of a preexisting infirmity" arising prior to recognition (304 U. S. at pp. 140, 141, 142).

During the period of non-recognition, a variety of rights in respect of property of Russo-Asiatic were asserted and acted upon. Judgments were entered in a number of cases to which Russo-Asiatic was a party. Among such cases are *Wulfsohn* v. *Russo-Asiatic Bank,* 11 F. (2d) 715 (C. C. A. 9th, 1926); *Hoppe* v. *Russo-Asiatic Bank,* 200 App. Div. 460 (1st Dept. 1922), aff'd 235 N. Y. 37 (1923); *Western Investors Corp.* v. *Russo-Asiatic Bank,* 204 App. Div. 411 (1st Dept. 1923). Guaranty itself paid

out, in regular course of business, almost $1,000,000 of funds standing to the credit of Russo-Asiatic for its branches at Shanghai, Paris and Yokohama (R. 233; cf. Ex. 5, R. 3193). The theory of retroactivity would, if literally applied to transactions effected outside of Soviet Russia, require the nullification of all such action—a result which we believe demonstrates its inapplicability.

Among the rights to property of Russo-Asiatic which came into existence during the period of non-recognition and prior to the Litvinov Assignment were the attachment liens acquired by Friede, Millard and Tillman, creditors of Russo-Asiatic whose claims have been filed with the Receivers (R. 553, 566).

Ordinarily, the laws of a foreign country, whether the government of such country has been recognized or not, are subject to local laws of the situs of the property for the protection of creditors. The mere recognition and enforcement of the validity of a foreign transfer does not, even under the full faith and credit clause of the Federal Constitution, preclude the attachment of property within the state by a local creditor of a foreign corporation, all of whose property has been previously transferred in the state of its incorporation to a statutory successor. *Clark* v. *Williard*, 294 U. S. 211 (1935); *Fischer* v. *American United Life Insurance Co.*, 314 U. S. 549, 553 (1942).

As this Court said in *Clark* v. *Williard* (pp. 213, 214):

> "If the corporation were still in being, and still the owner of the assets, its ownership would be subordinate to the process of the local courts. So much would be conceded everywhere.
>
> * * * * * * *
>
> "The principal of these decisions applies with undiminished force to a statutory successor. In re-

> spect to his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded * * *."

It is submitted that subsequent recognition of Soviet Russia by the United States and the Litvinov Assignment could not have the effect of invalidating attachment liens acquired prior thereto (*Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, 141 (1938); *Prevost* v. *Greneaux*, 19 How. 1, 7; *State of Russia* v. *National City Bank*, 69 F. (2d) 45, 48 (C. C. A. 2d, 1934); *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d) 396, 400, 401 (C. C. A. 2d, 1927); and that, whether or not property which had been attached was expressly excluded from the Litvinov Assignment by its second paragraph (See Anderson "Recognition of Russia", 28 *American Journal International Law*, January 1934, 90, 96), they are clearly "preexisting infirmities" in the rights acquired by the Government under the Assignment.

POINT III

THE PETITIONERS, AS RECEIVERS UNDER SECTION 977-b OF THE NEW YORK CIVIL PRACTICE ACT, ARE ENTITLED TO ASSERT THE RIGHTS OF CREDITORS WHOSE CLAIMS HAVE BEEN FILED IN THE RECEIVERSHIP.

The opinion of the District Court (which, in so far as material here, was adopted by the Circuit Court of Appeals) does not deal with the question of the nationality of the claims for which the petitioners seek protection. The reason for such omission is apparently to be found in the statement (58 F. Supp. at p. 629) that:

> "whatever might be the rights of a New York creditor, if asserted, the receiver is a mere custodian asking possession * * *."

The District Court evidently concluded that the Receivers were not entitled to assert the rights of creditors whose claims were filed in the receivership and it was apparently for that reason that the court did not discuss the effect of the Millard and Friede attachments.

In reaching that conclusion, the court below overlooked the fact that under New York law—which is clearly controlling (*Ruhlin* v. *New York Life*, 304 U. S. 202 [1938]; *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 [1945])—the Receivers clearly do have the right to assert all of the rights of creditors whose claims have been filed with them. Thus in *United States* v. *Pink*, 36 N. Y. Supp. (2d) 961 (Sup. Ct. 1942), in answer to the contention that the judgment of this Court in the *Pink* case was not binding on individual claimants, because they were not actual parties to the action, the New York court points out that the Superintendent of Insurance, as liquidator, was in effect a Statutory Receiver, and said (pp. 965-66):

> "* * * As liquidator, he represented the individual defendants and other claimants, and any judgment that would bind and estop him would also bind and estop them, even though they were not named in the action, or were not parties to it by name. Herring v. New York, L. E. & W. R. Co., 105 N. Y. 340, 370, 371, 12 N. E. 763; Ashton v. City of Rochester, 133 N. Y. 187, 193, 194, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619; Brenner v. Title Guarantee & Trust Co., 276 N. Y. 230-237, 238, 11 N. E. 2d 890, 114 A. L. R. 1010; Freeman on Judgments, 5th Ed., 435-437; Black on

> Judgments, 2d Ed. § 585a, 30 Am. Jur. 962, § 228; 34 C. J. 1004, § 1424. 'This is upon the principle that they are represented in the litigation by agencies authorized to speak for them, and to protect their interests.' Ashton v. City of Rochester, supra [133 N. Y. 187, 30 N. E. 967]."

A conclusion that the Receivers are not entitled to assert the right of creditors in the Receivership would work manifest injustice. Both the 1936 order appointing the temporary Receivers (Ex. 6, R. 3196) and the 1938 judgment appointing the permanent Receivers (Ex. 9, R. 3205), contained injunctions which prohibited creditors from prosecuting their claims individually against the property of Russo-Asiatic. Such injunctive provisions were within the jurisdiction of the court which appointed the Receivers and effectively bound all creditors of Russo-Asiatic. *Matter of Attorney General* v. *Mutual Life Insurance Company,* 77 N. Y. 272, 276-77 (1879); *Re Receiver of City Bank of Buffalo,* 10 Paige 378 (1843).

Even apart from such injunctive provisions, the mere filing of claims in the receivership disenables a creditor from asserting his claim independently of the receivership. *Re Receiver of City Bank of Buffalo,* 10 Paige 378 (1843), 382; *Farmers Loan and Trust Company* v. *Bankers and Merchants Telegraph Co. et al.,* 83 Hun 560 (1895), aff'd 148 N. Y. 315 (1898); *Alexander* v. *Hillman,* 296 U. S. 222 (1935).

Accordingly, the Receivers must be held to be entitled to assert the rights of creditors whose claims had been filed in the receivership in order that such rights can be preserved.

POINT IV

THE RUSSIAN DECREES NATIONALIZING BANKS DID NOT HAVE EXTRATERRITORIAL EFFECT UPON THE BANK DEPOSITS OF RUSSO-ASIATIC IN NEW YORK.

In the *Pink* case, this Court concluded, with reference to the Soviet decree nationalizing insurance companies that "so far as its intended effect is concerned, the Russian decree embraced the New York assets of the First Russian Insurance Company" (p. 221). In so concluding, this Court overruled the holding of the New York Court of Appeals in *Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.*, 280 N. Y. 286 (1939), which had been made on the basis of the evidence before that Court concerning the interpretation of Soviet law, that the insurance decrees were not intended to have extraterritorial effect. This Court, however, made it clear that if the Russian decrees in question had no extraterritorial effect, that would be "decisive of the present controversy. For the United States acquired, under the Litvinov Assignment, only such rights as Russia had." (p. 217.)

This Court based its conclusion in the *Pink* case on an opinion of the Third Department of the Soviet Commissariat of Justice, conceived after the decision of the *Moscow* case, that "all nationalized funds and property of former private enterprises and companies, in particular, by virtue of the decree of Novemder 28, 1918 [the insurance decree] * * * the funds and property of the former insurance companies, constitute the property of the State, irrespective of the nature of the property and irrespective of whether it was situated within the territorial limits of the R. S. F. S. R. or abroad" (Interpretation of November 28, 1937, Ex. 319,

R. 3427). The evidence in the present case, however,—which was not before this Court in the *Pink* case—establishes that the Third Department of the Commissariat of Justice is, like our own Department of Justice, authorized merely to render advisory opinions to governmental agencies upon request (R. 2283, Exs. 320, 408; R. 3428, 3478), and that the only body having authority to render conclusive interpretations of Soviet law is the Plenum of the Supreme Court (R. 2283, 2572; Ex. 2R, R. 3182).

Manifestly, the "interpretation" of the Soviet Commissariat of Justice, rendered for the purpose of affecting the result of a litigation in a foreign jurisdiction, means no more than that it was in the interest of the Soviet Government at the time to adopt such interpretation. An analogous situation would be presented here if the United States were to produce an impressively sealed opinion of the Attorney General certifying that under the law of the United States the funds here involved belong to the United States Government. As the English High Court of Justice said in *The Jupiter* (No. 3) [1927], P. 122 (pp. 138-139):

> "* * * In a question between the Crown and a private person as to the property in chattels here, it surely would not be conclusive if a Minister of State made oath that the property was in the Crown. A fortiori, is the declaration of a sovereign to be accepted as conclusive when a question as to property is litigated between private persons, and the evidence produced by one of them is a declaration by a sovereign that the property had been in that sovereign? Moreover, if the declarations of a sovereign as to the ownership of property, not made for the purpose of securing immunity from jurisdiction, are to be conclusive, there is no reason why the same force should not be given to all other declarations. Why call

> foreign lawyers to prove the fact or the effect of foreign law, if a simple declaration by the representative of the foreign sovereign would be conclusive? * * *"

There is, however, no Soviet Commissariat of Justice "interpretation" of the decrees nationalizing banks, as distinguished from the decrees nationalizing insurance and other companies. The reason for such omission is plain; for, unique among all the Soviet nationalization decrees, the banking decrees took over not only assets, but also liabilities. The Decree of December 27, 1917, in relevant part is as follows (Ex. 2A, R. 2681-82):

> "1. Banking business is declared a State Monopoly.
>
> "2. All existing private joint stock banks and banking houses are merged with the State Bank.
>
> "3. The assets and liabilities of the liquidated banks are taken over by the State Bank.
>
> "4. The method of effecting the merger of private banks with the State Bank shall be determined by a special decree."

In the case of Russian banking corporations, such as Russo-Asiatic, carrying on a world-wide business, with branches in France, England and the Far East, it is readily apparent that the Soviet Government, whatever may have been its desire to acquire *assets* wherever it could find them, would not voluntarily have assumed far-flung financial commitments of Russian banks in foreign countries. Every act of the Soviet Government with reference to the banking decrees is consistent with, and consistent only with, a fixed purpose to restrict the application of such decrees to territory subject to its control.

It is true that the decree of December 27, 1917, does not contain any express territorial limitation. In that respect, however, it is precisely analogous to the decree of December 2, 1918 "liquidating" *foreign* banks functioning within the R. S. F. S. R. (Ex. 21, R. 3154). Certainly, no one would suggest that the Soviet Government intended thereby to affect assets of foreign banks outside Soviet Russia.

Furthermore, the failure of the Banking Decree of December 27, 1917 affirmatively to specify properties located abroad is significant, in view of the fact that in other cases, where the Soviet Government intended to reach foreign property, appropriate language was used. Thus, in the decree of December 28, 1917, nationalizing the Russian-Belgian Metallurgical Company (Ex. 2M, R. 3173) and in the decree of July 13, 1918, nationalizing the property of the Romanoff family (Ex. 2N, R. 3175), foreign properties (and in the latter case, foreign bank deposits) were specifically included.

In addition, subsequent nationalization decrees and the course of conduct followed by the Soviet Government make it abundantly clear that only the Russian assets and liabilities were intended to be affected by the decrees.

The decree of December 27 provided that "the method of effecting the merger of private banks with the State Bank shall be determined by a special decree" (par. 4). Pursuant to that provision, the regulations of December 10, 1918 (Ex. 2J, R. 3155), June 14, 1919 (Ex. 2S, R. 2691), and August 3, 1921 (Ex. 2L, R. 3168) were promulgated. Those regulations cover, in elaborate detail, all aspects of the nationalization of Russian private banks and include provisions for the establishment of technical liqui-

dation boards, the restatement of accounts, and amalgamation of balance sheets (as of December 27, 1917), the continuance of operations as branches of the People's Bank and the computation and credit of interest. Notwithstanding the detail of such regulations, no provision whatever is made for taking over or liquidating foreign branches or for obtaining foreign properties.

Furthermore, the decree of August 3, 1921 states that the transfer of assets and liabilities under the decree of December 27, 1917, had "already been everywhere completed" and, on that basis, directed the immediate discontinuance of "any and all proceedings of nationalization" (Ex. 2L, R. 3169).

No further action was taken in respect of the nationalization of banks, and at no time was any action even suggested, much less taken, with respect to the foreign properties of nationalized banks (R. 2193).

That the failure of the Soviet Government to take such action was not due to inadvertence or to difficulties incident to its foreign relations is made clear by the provision in the decree of January 31, 1918 (Ex. 2B, R. 3151), temporarily stopping payment of bank deposits to foreign embassies and missions "in order to make it possible for the Russian Republic to have at its disposal the people's money deposited abroad in foreign banks by the former government"—only by "the former government", be it noted, not by the nationalized corporations—an unequivocal indication that the Soviet Government was fully conscious of the existence of bank deposits abroad and was taking action with respect to such of those bank deposits as it had intended to acquire.

In this connection it is significant that although the Commissariat of Finance on August 2, 1921, ordered the

establishment of a subdivision of said Commissariat for the ascertaining of mutual indebtedness between credit establishments of the Soviet republic and credit establishments abroad, there is no evidence that any attempt was made by such subdivision to ascertain or collect the balances of the former private banks in credit institutions abroad (Ex. 406, R. 3474).

The fact that the Soviet government considered it necessary to enact new bank nationalization decrees in territory of the former Russian Empire when such territory came under its domination (R. 2196, 2615, 2616) is persuasive evidence that the decrees were not intended to have any force outside of territory actually controlled by the Soviets.

It is significant that although the Soviets brought actions in various parts of the world to recover their nationalized ships (*The Penza*, 277 Fed. 91 (E. D. N. Y. 1921); *The Rogdai*, 278 Fed. 294 (N. D. Calif. 1920); *The Jupiter* (No. 3) [1927] P. 122; aff'd Ct. of Appeal [1927] P. 250), there is no known instance of an action being brought to recover any deposits abroad of nationalized banks.

Indeed, in the case of Russo-Asiatic, the Soviet Government, through its participation in the management of the Chinese Eastern Railway, maintained a continuing banking relationship with certain of the Far Eastern branches of the Bank after its Russian properties had been nationalized. On May 31, 1924, upon recognition of the Soviet Government by China, the Soviet Government entered into an agreement with the Chinese Government under which the former took part in the operation of the Chinese Eastern Railway (R. 575-6; Ex. 11, R. 3218, 3224-6). From that date until the liquidation of the Chinese branches of Russo-Asiatic on October 1, 1926, not only did the

Manchurian branches of the Bank at Harbin, Hailar and Chang Chun continue to operate within the zone of the Chinese Eastern Railway (R. 576), but the latter's account with Russo-Asiatic was continued by the Soviet Government (R. 577; Ex. 12, R. 3227). Notwithstanding this close post-nationalization identification of the Soviet Government with a banking enterprise, all of whose assets abroad are now said to have been taken over by that Government in 1917, no claim to the Chinese properties of the Bank was ever asserted by the Soviet Government either before or after the liquidation of the Chinese branches (R. 577-8).

Finally, the only evidence in this case of an interpretation of the effect of the Soviet decrees by the Supreme Court of Russia (the only conclusive authority upon the meaning of Soviet law [R. 2283, 2572; Ex. 2R, R. 3182]) is to the effect that those decrees did not affect property rights in territory which was not under Soviet control. That was the decision in *Johannson* v. *Kunst & Albers* in which it was held that the 1918 decree of the R. S. F. S. R. abolishing the right of inheritance could not be made the basis for determining legal relationships in Vladivostok because the decree had not specifically "been introduced on the territory for the former Far Eastern Republic through either any enactment of the R. C. [Revolutionary Committee] of the Far East or any decree of the Central Government of the R. S. F. S. R." after Vladivostok became a part of the R. S. F. S. R. (Ex. 427, R. 3243, 45). It should be here noted that this decision necessarily required an interpretation of the banking decrees since the case involved a bank deposit and that although the Soviet Government was a party to the action and the case involved the liability of a

private banking house no claim was made that the Soviet Government had succeeded to the assets and liabilities of the bank by reason of the banking decree of 1917.

In *In re Russian Bank for Foreign Trade* [1933], 1 Ch. 745, the English High Court of Justice carefully reviewed the Soviet decrees nationalizing banks, and reached the following conclusions:

> (1) "By the decree of December, 1917, [Ex. 2A, R. 2681] the assets and liabilities of the bank *within Soviet territory* were taken over by the People's Bank, and this in my opinion involves the destruction of the original debt and a kind of statutory novation (in some sense, perhaps, only a theoretical one) whereby the State Bank became liable to discharge it" (p. 766). [Italics added.]
>
> (2) "In passing I note that the decree [the decree of January 19, 1920 (Ex. 2K, R. 2689) abolishing the People's Bank] assumes that all the assets and liabilities of the former joint-stock banks capable of being vested had already been vested in the People's Bank" (p. 760).
>
> (3) "It is interesting to note that the same view [i.e., the view that the decrees in question could not have the effect of extinguishing debts situated in England] is taken by the R. S. F. S. R. itself in a circular dated April 12, 1922 [Ex. 2P, R. 3177] and in a circular issued by the People's Commissariat of Justice to all Districts Courts dated September 26, 1923 [Ex. 2Q, R. 3179] which are set out in the elaborate judgment of Hill, J., above referred to [i.e., *The Jupiter*]. These circulars show that the Soviet Government does not regard the nationalising decrees as having any extra-territorial effect even as against Russian citizens" (p. 767).

(4) "Of course, if I am right in thinking that the nationalization decrees have no extra-territorial operation the R. S. F. S. R. have no claim to any of the property which is involved, and as I have pointed out, this seems to be their own view" (p. 770).

It is submitted that the conclusion must be that, although the insurance decrees may have "nationalized the business of insurance and all of the property, wherever situated" (315 U. S. 210), the decrees nationalizing banks were not intended to affect property outside the territory of Soviet Russia.

POINT V

THE LITVINOV ASSIGNMENT DOES NOT REQUIRE NULLIFICATION OF THE PROCEDURAL AND REMEDIAL PROVISIONS OF SECTION 977-b OF THE NEW YORK CIVIL PRACTICE ACT.

The local law superseded by this Court in the *Pink* case was a State public policy against confiscation which denied validity, in New York, to a foreign law confiscating assets and repudiating liabilities. This Court however called attention (p. 222) to its earlier holding in the *Guaranty Trust Company* case (304 U. S. 126 [1938]) that the Litvinov Assignment did not require the abrogation of other local laws, such as the statute of limitations, notwithstanding that their effect would be to limit or prevent the enforcement of rights acquired by virtue of the Russian decrees. In the *Guaranty Trust Company* case, this Court had pointed out (304 U. S. at p. 134):

"By voluntarily appearing in the role of suitor it [the foreign sovereign] abandons its immunity from

> suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States* v. *The Thekla,* 266 U. S. 328, 340, 341; *United States* v. *Stinson,* 197 U. S. 200, 205; *The Davis,* 10 Wall. 15; *The Siren,* 7 Wall. 152, 159."

In other words, in determining the Federal policy evidenced by the Litvinov Assignment, this Court has held that a local policy denying validity to the Russian nationalization decrees is contrary to Federal policy and therefore unenforcible; but that local laws of general application regulating the procedure for the enforcement of rights do not conflict with Federal policy and may be given their customary effect.

That is also the Government's view. Thus in its brief in the Supreme Court in *United States* v. *Moscow,* 309 U. S. 624 (1939), the United States said (p. 40):

> "This holding [*Guaranty Trust* v. *United States*] merely recognizes that when judicial aid is invoked in the consummation of the assignment, *the procedural and remedial provisions, which define the nature of judicial remedies available in the forum, apply.*" (Italics added.)

In the instant case, the local law involved is not a local policy against confiscation, but is that part of Section 977-b of the Civil Practice Act which, through receivership, creates an agency to collect and administer the fund for the benefit of creditors and other claimants. It is what

the Government has described as "the procedural and remedial provisions which define the nature of judicial remedies available in the forum". It provides a comprehensive plan for the collection or marshalling by court-appointed receivers of assets in New York, belonging to any foreign corporation previously dissolved for any cause in its domicile; for the giving of notices to all creditors and others interested as directed by the Court; for the determination of claims of all creditors by the receivers, subject to review by the Court; and for the distribution pursuant to Court order of the assets collected.

It will, of course, be the duty of the Receivers to distribute the assets under court order in conformity with the applicable principles of law and national policy. *Propper* v. *Buck*, 178 Misc. 76 (Sup. Ct., 1942).

As was said in *Fosdick* v. *Schall*, 99 U. S. 235, 251 (1878):

> "The possession taken by the receiver is only that of the court, whose officer he is * * *. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the mean time the court proceeds to determine the rights of the parties upon the same principle it would if no change of possession had taken place."

Receivership procedure established by local law for the protection of all claimants to the assets in question is in no sense inconsistent with the enforcement of the claim of the United States. That fact was recognized by the Government in the present case when it said, in connection with its appeal from the order of the District Court denying its motions to consolidate its actions with the Re-

ceivers' action and for substitution in the latter action (Brief in the Circuit Court of Appeals, p. 121):

> "Those provisions of the statute [Section 977-b] which conflict with the Government's interest * * * are now held ineffective by the *Pink* case. But the proceeding is *in rem* for the administration of the local assets of the dissolved foreign corporation, and for the benefit of all persons who may claim an interest in such *res*. Its scope is indicated in Governor Lehman's memorandum filed upon his approval of the Bill and also in a statement thereon by the State Court."*

The fact that, as the court below said, Section 977-b "proposes a complete scheme of distribution, taking in creditors wherever they may reside" (R. 3078) does not bring New York's policy in collision with that of the federal government. The power of a State to deal with assets in its jurisdiction has always been upheld unless exercised in a manner to conflict with paramount federal law. In *Clark* v. *Williard*, 294 U. S. 211, this Court said (p. 213):

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*The memorandum of Governor Lehman upon approval of Section 977-b stated in part:

> "The purpose of this Bill is to provide some machinery for the liquidation of assets in the State of New York which belong to certain foreign corporations. * * *
>
> * * * * *
>
> "It seems to me that some machinery must be provided for the determination of these conflicting rights to such assets. The courts are the proper agency for the performance of the determination. In effect this Bill will vest jurisdiction in our courts to enable them to try and determine the rights asserted both by governments and by private corporations and individuals." [Memorandum of June 8, 1936, filed with Senate Bill Int. No. 922, Pr. No. 1623.]

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts. *Green* v. *Van Buskirk,* 5 Wall. 307, 312; 7 Wall. 139; *Hervey* v. *Rhode Island Locomotive Works,* 93 U. S. 664, 671; *Security Trust Co.* v. *Dodd, Mead & Co.,* 173 U. S. 624, 628. Montana does not challenge the standing of this foreign liquidator as successor to the dissolved corporation or as owner of its assets. On the contrary his standing and ownership are now explicitly conceded. All that Montana does by the decree under review is to impose upon such ownership the lien of judgments and executions in conformity with local law. In this there is no denial to the statutes of Iowa or to its judicial proceedings of the faith and credit owing to them under the Constitution of the United States. United States Constitution, Article IV, § 1."

The fact that the United States is a claimant to the funds here sued for does not require any different conclusion. *United States* v. *Bank of New York,* 296 U. S. 463 (1936); *Meyer* v. *Petrograd Metal Works,* 256 App. Div. 1077 (2d Dep't, 1939); leave to appeal den. 281 N. Y. 887 (1939). As the Court said in the *Meyer* case (p. 1078):

> "* * * The proceeding, instituted in accordance with the provisions of section 977-b of the Civil Practice Act, is *in rem* for the purpose of distribution of assets of a foreign corporation which has been nationalized and may not be vitiated because of the status of the United States as a claimant to the assets. It may, without impairment of its rights, prosecute its claim before the receiver."

CONCLUSION

It is respectfully submitted that this case calls for the exercise of supervisory powers by this Court and that the writ should be allowed.

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